Pacific Inter-Link Sdn Bhd v Aikbee Timbers (Sabah) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–397 OF 2001
NALLINI PATHMANATHAN JC
12 AUGUST 2009

Sale of Goods — Conditions and warranties — Goods not according to specification — Parties relied on description of timber in making contract of sale — Whether term in contract of sale specifying description and quality of timber was fundamental term of contract — Whether plaintiff was entitled to reject goods — Whether property in goods had passed to plaintiff — Whether plaintiff was justified in withholding taking of delivery of timber that was ready for shipment — Whether defendant was justified in refusing plaintiff's right to re-inspect good

The plaintiff company entered into a contract of sale to purchase 1,301.553 tons of hard redwood full sawn timber of merchantable grade from the defendant company. It was specified in the contract that the timber was to be free from white/yellow species, decay, dead knots splits and wane. The contract of sale was a free alongside contract ('FAS contract') wherein the defendant undertook to deliver the goods free alongside a ship designated by the plaintiff at Sandakan port. It was a further term of the contract that 30% of the purchase price was to be paid in advance and the balance 70% one week prior to shipment. After an initial delay, the defendant produced the requisite quantity of timber to meet the subject contract of sale and requested the plaintiff to arrange for a vessel and pay the balance purchase price. The plaintiff's manager, Robson, who was stationed in Sabah stated that he had inspected the cargo and found that it was in good condition and that quality conformed to the contract requirements. The balance of the purchase price was then paid. Prior to the subject contract, the plaintiff had entered into a contract for sale for the purchase of a similar specification of timber for shipment to Yemen. This order was duly processed and shipped to Yemen but the plaintiff received complaints that the goods did not conform to contract specifications and suffered a rejection of this batch of timber from its end-buyer in Yemen. The plaintiff had also advised the defendant of the complaints and rejection of the earlier shipment of timber sold by the defendant. By reason of this rejection, the plaintiff informed the defendant that it would not be arranging for a vessel for the current order but required the goods now ready for shipment to be examined by an independent grader

with a view to ascertaining that it was in conformity with the contract. However the defendant refused to be party to any further inspection on the grounds that the plaintiff had already exercised its right of inspection vide its manager Robson and took the position that the property in the goods had already passed to the plaintiff. As the parties were unable to agree as to who had responsibility for the custody of the timber while the quality of the wood was under inspection the plaintiff wrote to the defendant setting out the entire history of the transaction and finally rejecting the 1,301.553 tons of timber for non-conformance with the contract specifications and demanded a return of the purchase price in the sum of RM1,197,462.61. The plaintiff then commenced the instant action against the defendant for the purchase price paid for the timber. The defendant then appointed the Malaysian Timber Board ('MTB') to examine and inspect the timber in dispute and the latter concluded that the timber was of merchantable quality. The defendant maintained that the plaintiff had wrongfully refused to take delivery of the timber and in response to the plaintiff's claim it counterclaimed for storage and insurance cover charges incurred as a result of the plaintiff's action. The main issues for determination were whether the plaintiff was justified in withholding the taking of delivery of timber that was ready for shipment; whether the defendant was justified in refusing the plaintiff to inspect the goods; whether the term in the contract of sale specifying the description and quality of the timber was a fundamental term of the contract; whether the plaintiff was entitled to reject the goods; and finally whether the defendant was entitled to its counterclaim.

Held, allowing the plaintiff's claim in part with costs and dismissing the defendant's counterclaim:

(1) In an FAS contract the property in the goods passes from the defendant seller to the plaintiff buyer on delivery alongside a vessel nominated by the plaintiff for delivery. In the instant case, as the timber did not leave the defendant's premises, the property in the timber did not pass to the plaintiff but remained with the defendant notwithstanding the payment of the full purchase price. Further, as there had been no delivery of the goods by the defendant to the plaintiff, the plaintiff had not accepted the goods when Robson examined those goods at the defendant's premises. Such an examination was undertaken prior to delivery and prior to the passing of property from the plaintiff to the defendant. Thus it follows that the plaintiff is entitled to be accorded a reasonable opportunity to inspect or re-inspect the timber until such time as the timber is taken alongside the vessel for delivery, unless otherwise agreed (see paras 48 & 56).

(2) Apart from the plaintiff's statutorily ensconced rights under s 34 of the Sale of Goods Act 1979 ('the Act'), the fact that the plaintiff had received complaints of defective goods in respect of a similar contract of redwood afforded sufficient basis for the plaintiff to insist that the timber under the subject contract be inspected prior to shipment to the end-buyer. The plaintiff was justified in delaying the delivery of the timber shipment in the light of the defects in the earlier shipment and was entitled to have an inspection by an independent grader, which opportunity was unreasonable withheld by the defendant. Thus the consistent refusal of the defendant to allow the plaintiff an opportunity to inspect the goods amounted to a breach of its duty and obligations under the contract of sale. The plaintiff was then entitled to treat the contract as discharged and to reject the cargo (see paras 58, 72–73).

(3) In the instant case, the parties understood that it was a fundamental term of the contract that the timber supplied by the defendant would conform to the description of hard redwood full sawn timber of merchantable grade free from white/yellow species, decay, dead knots splits and wane. This was evidenced in the correspondence between the parties and the descriptions given by the witnesses who testified at the trial. It followed therefore that the parties treated this term of the contract as a condition of the contract of sale. A breach would thus entitle the plaintiff to treat such breach as repudiatory and to reject the contract. Since the parties relied on the description of the timber in making the contract of sale, it follows that the term was also an implied term under s 13 of the Act (see paras 78 & 83).

(4) The MITB report that had been commissioned by the defendant was not relevant for the purposes of ascertaining the quality and conformity of the timber with the contract of sale. The timber that was supplied by the defendant was not in strict accordance with the contract specifications and this meant that the defendant had breached its obligations. The breach amounted to a breach of the fundamental term of the contract for sale. In addition the defendant had wrongfully refused to allow the plaintiff to inspect the goods to ascertain whether they conformed to contract specifications. These breaches are serious and go to the root of the contract. As such the plaintiff was entitled to repudiate the contract as it did (see paras 103–104, 110–111).

(5) As the plaintiff was justified in refusing to arrange for the delivery of the timber until it had a reasonable opportunity to re-inspect it before shipment and since the plaintiff was entitled to and did reject the goods for non-conformity with the contract the defendant was not entitled to counterclaim for the storage and insurance cover charges (see para 118).

[Bahasa Malaysia summary

Syarikat plaintif menandatangani satu kontrak jualan untuk membeli 1,301.553 tan kayu balak redwood bergred dagangan jenis keras yang telah dipotong sepenuhnya daripada syarikat defendan. Telah dinyatakan di dalam kontrak bahawa kayu balak tersebut mestilah bebas daripada spesis putih/kuning, reput, bersimpul mati and wen. Kontrak jualan tersebut merupakan kontrak sampingan percuma ('kontrak SP') di mana defendan menghantar barang-barang secara percuma bersama kapal yang dipilih oleh plaintif di pelabuhan Sandakan. Terma lanjut kontrak tersebut ialah 30% daripada harga belian perlu dibayar terlebih dahulu dan baki 70% dibayar seminggu sebelum penghantaran. Selepas kelewatan pada permulaannya, defendan kemudiannya mengeluarkan kuantiti pokok balak yang diperlukan untuk memenuhi kontrak jualan tersebut dan meminta plaintif mengaturkan kapal dan membayar baki harga belian. Pengurus plaintif, Robson, yang ditugaskan di Sabah menyatakan bahawa dia telah memeriksa kargo dan mendapati ia berada dalam keadaan baik dan kualitinya menepati keperluan kontrak. Baki harga belian kemudiannya dibayar. Sebelum kontrak tersebut, plaintif telah menandatangani satu kontrak jualan untuk membeli kayu balak yang sama spesifikasi untuk penghantaran ke Yaman. Pesanan tersebut diproses dan dihantar ke Yaman tetapi plaintif menerima aduan bahawa barang-barang tersebut tidak menepati spesifikasi kontrak dan kayu balak tersebut ditolak oleh pembeli akhir di Yaman. Plaintif juga memaklumkan defendan mengenai aduan dan penolakan penghantaran kayu balak sebelumnya yang dijual oleh defendan. Disebabkan penolakan tersebut, plaintif memaklumkan defendan bahawa mereka tidak akan mengaturkan kapal untuk pesanan terkini tetapi meminta barang-barang yang sudah sedia untuk penghantaran diperiksa oleh penggred bebas bagi memastikannya menepati kontrak. Walau bagaimanapun defendan enggan untuk menjadi pihak yang diperiksa atas dasar plaintif telahpun melaksanakan haknya untuk memeriksa melalui pengurusnya Robson dan harta dalam barang-barang telahpun diberikan kepada plaintif. Memandangkan pihak-pihak tidak bersetuju mengenai siapa yang bertanggungjawab untuk jagaan kayu balak tersebut semasa kualiti kayu tersebut di bawah pemeriksaan, plaintif menulis kepada defendan menjelaskan semua sejarah transaksi dan akhirnya menolak 1,301.553 tan kayu balak kerana tidak menepati spesifikasi kontrak dan meminta pulangan harga belian berjumlah RM1,197,462.61. Plaintif kemudiannya memulakan tindakan ini terhadap defendan untuk harga belian yang dibayar untuk kayu balak tersebut. Defendan kemudiannya melantik Lembaga Kayu Malaysia ('MTB') untuk memeriksa kayu balak yang dipertikaikan dan defendan kemudiannya menyimpulkan bahawa kayu balak tersebut berkualiti dagangan. Defendan mengekalkan bahawa plaintif enggan menerima penghantaran kayu balak tersebut dan sebagai jawapan kepada tuntutan plaintif, ia menuntut balas untuk caj-caj penyimpanan dan

perlindungan insurans yang terlibat akibat tindakan plaintif. Isu-isu untuk ditentukan ialah sama ada plaintif betul dalam keengganannya untuk menerima penghantaran kayu balak yang sedia untuk dihantar; sama ada defendan berjustifikasi dalam keengganannya membenarkan plaintif memeriksa barang-barang; sama ada terma dalam kontrak belian yang menyatakan deskripsi dan kualiti kayu balak merupakan terma utama kontrak tersebut; sama ada plaintif berhak untuk menolak barang-barang tersebut; dan akhirnya sama ada defendan berhak kepada tuntutan balasnya.

Diputuskan, membenarkan sebahagian tuntutan plaintif dengan kos dan menolak tuntutan balas defendan:

(1) Di dalam kontrak SP harta dalam barang-barang berpindah tangan daripada penjual defendan kepada pembeli plaintif atas penghantaran bersama dengan kapal yang dipilih oleh pembeli plaintif untuk penghantaran. Dalam kes ini, memandangkan kayu balak tersebut tidak meninggalkan premis defendan, harta dalam kayu balak tersebut tidak diberikan kepada plaintif tetapi kekal dengan defendan walaupun selepas pembayaran penuh. Selanjutnya, memandangkan tiada penghantaran barang-barang oleh defendan kepada plaintif, plaintif tidak menerima barang-barang tersebut ketika Robson memeriksa barang-barang tersebut di premis defendan. Pemeriksaan tersebut dijalankan sebelum penghantaran dan sebelum memberikan harta tersebut daripada plaintif kepada defendan. Oleh itu plaintif berhak diberikan peluang untuk memeriksa kayu balak sehinggalah kayu balak tersebut dibawa bersama kapal untuk penghantaran, melainkan dia bersetuju di sebaliknya (lihat perenggan 48 & 56).

(2) Selain daripada hak tetap statutori plaintif di bawah s 34 Akta Jualan Barangan 1979 ('Akta'), fakta bahawa plaintif telah menerima aduan-aduan barang-barang cacat berkenaan kontrak redwood yang sama memberikan asas yang mencukupi untuk plaintif bertegas bahawa kayu balak di bawah subjek kontrak perlu diperiksa sebelum penghantaran kepada pembeli akhir. Plaintif berjustifikasi dalam melewatkan penghantaran kayu balak tersebut berdasarkan kecacatan dalam penghantaran sebelumnya dan berhak untuk mengadakan pemeriksaan dengan penggred bebas, yang mana adalah tidak munasabah apabila peluang tersebut tidak diberikan oleh defendan. Oleh itu keengganan defendan secara terus-terusan untuk membenarkan plaintif memeriksa barang-barang merupakan pelanggaran tugas dan kewajipannya di bawah kontrak jualan. Oleh itu plaintif berhak untuk menganggap kontrak tersebut dibatalkan dan menolak kargo tersebut (lihat perenggan 58, 72–73).

(3) Dalam kes ini, pihak-pihak memahami bahawa terma utama kontrak ialah kayu balak yang dibekalkan mestilah menepati deskripsi kayu redwood bergred dagangan jenis keras dan dipotong sepenuhnya, bebas daripada spesis putih/kuning, reput, simpulan mati dan wen. Ini dibuktikan dengan surat-menyurat di antara pihak-pihak dan deskripsi yang diberikan oleh saksi-saksi yang memberi keterangan pada perbicaraan. Oleh itu pihak-pihak menerima terma kontrak ini sebagai syarat perjanjian jualan. Oleh itu pelanggaran tersebut memberikan hak kepada plaintif untuk menerima pelanggaran tersebut sebagai penolakan dan menolak kontrak tersebut. Memandangkan pihak-pihak bergantung dengan deskripsi kayu balak dalam membuat kontrak jualan, terma tersebut merupakan terma tersirat di bawah s 13 Akta (lihat perenggan 78 & 83).

(4) Laporan MITB yang telah ditugaskan oleh defendan tidak relevan bagi tujuan untuk memastikan kualiti dan ketepatan kayu balak dengan kontrak jualan. Kayu balak yang dibekalkan oleh defendan tidak mengikut spesifikasi kontrak dan ini bermaksud defendan telah melanggar kewajipannya. Pelanggaran ini merupakan pelanggaran terma utama kontrak jualan. Sebagai tambahan defendan dengan salah enggan membenarkan plaintif untuk memeriksa barang-barang bagi memastikan ianya menepati spesifikasi kontrak. Pelanggaran ini adalah serius dan merupakan teras kontrak. Oleh itu plaintif berhak untuk menolak kontrak tersebut sepertimana yang dilakukannya (lihat perenggan 103–104, 110–111).

(5) Memandangkan plaintif berjustifikasi dalam keengganannya untuk mengaturkan penghantaran kayu balak sehingga ia mempunyai peluang yang munasabah untuk memeriksanya sebelum penghantaran dan memandangkan plaintif berhak menolak barang-barang yang tidak menepati kontrak maka defendan tidak berhak ke atas tuntutan balasnya untuk caj-caj penyimpanan dan perlindungan insurans (lihat perenggan 118).]

Notes

For a case on goods not according to specification, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) para 721.

Cases referred to

Aik Ming (M) Sdn Bhd v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Ashington Piggeries Ltd & Anor v Chirstopher Hill Ltd [1971] 1 All ER 847, HL (refd)

Bentsen v Taylor, Sons & Co (2) [1893] 2 QB 274; 7 Asp MLC 281, CA (refd)

Bunge Corp v Tradax SA [1981] 2 All ER 513, QBD, CA & HL (folld)

Couchman v Hill [1947] 1 All ER 103, CA (refd)

A *Low Hock Jee v Mayban Finance Berhad* [1996] 2 CLJ 479, HC (refd)
Nippon Yusen Kaisha v Ramjiban Serowgee [1938] AC 429, PC (refd)
Perkins v Bell [1893] 1 QB 193, CA (refd)
Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556, HL (refd)
Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570, HL (refd)
B *Ronaasen & Son v Arcos Ltd* (1933) 45 Ll L Rep 33, HL (refd)
Toepfer v Warinco AG [1978] 2 Lloyd's Rep 569, HC (refd)
Tradax Export SA v European Grain & Shipping Ltd [1983] 2 Lloyd's Rep 100 (refd)
Yap Chin Hock & Anor v Cheng Wang Loong [1964] MLJ 276, HC (refd)
C

Legislation referred to
Civil Law Act 1956 s 5(2)
Sale of Goods Act 1957 s 1(2)
Sale of Goods Act 1979 [UK] ss 11(3), 13, 18 r 5, 20, 34, 35, 35(2), 51
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Mathew Kurien (Arun Krishnan Lingam with him) (Sativale, Mathew Arun) for the plaintiff.
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Nallini Pathmanathan JC:

INTRODUCTION

F **[1]** On 4 May 2000, Pacific Inter-Link Sdn Bhd ('the plaintiff') entered into a contract of sale with Aikbee Timbers (Sabah) Sdn Bhd ('the defendant') for the purchase of 1,301.553 tons of hard redwood full sawn timber of merchantable grade at specified sizes, which was to be shipped to Aden Port in Yemen. It was specified that the timber was to be free from white/yellow
G species, decay, dead knots, splits and wane. The contract of sale was an FAS contract (free alongside contract) which meant that the seller, ie the defendant, undertook to deliver the goods free alongside a ship designated by the buyer, ie the plaintiff, at Sandakan port. It was a further term of the contract that thirty percent of the purchase price was to be paid in advance
H and the balance seventy per cent one week prior to shipment.

[2] The defendant produced the requisite quantity of timber after an initial delay, and on 1 August 2000, requested the plaintiff to arrange for a vessel and pay the balance purchase price. The plaintiff's manager stationed in
I Sabah inspected the timber and confirmed the foregoing. The balance purchase price was paid on 10 August 2000. Prior to the plaintiff arranging for a vessel, it received a complaint and suffered a rejection of another batch of redwood from one of its end buyers abroad, on the basis that the redwood was not in conformity with the contract. The terms of this latter contract

were similar to the terms of the contract comprising the subject matter of this dispute. The batch of redwood in the rejected contract had also been produced by the defendant. By reason of this rejection, the plaintiff advised the defendant that it would not be arranging for a vessel for the current order, but required that the goods now ready for shipment be examined by an independent grader with a view to ascertaining that it was in conformity with the contract.

[3] The defendant responded by stipulating that as the property in the goods had passed to the plaintiff upon payment of the purchase price, the plaintiff was at liberty to do as it saw fit with the timber. However the defendant maintained that it was unable to accede to the request for a further inspection as the goods had already been examined by the plaintiff's agent, one William Robson prior to release of the purchase price, and on the further grounds that there was insufficient space at that point in time on the defendant's premises, to allow for an inspection. As a consequence no independent inspection was undertaken then. The defendant also requested that the plaintiff advise on the destination of the timber, failing which the defendant would levy storage charges.

[4] Subsequently on 25 September the plaintiff via its manager inspected the timber at the defendant's premises and immediately thereafter wrote to the defendant stating that the goods were defective and did not conform to contract specifications. Amongst other things, the plaintiff maintained that the timber had been injected with a red dye and comprised white and yellow species and contained splits and wane. The defendant did not accept this to be the case. Attempts were made to resolve the matter but failed. The plaintiff wrote to the defendant rejecting the timber on the grounds that on examination it was found not to conform to the specifications set out in the contract. Accordingly the plaintiff did not appoint a vessel to transport the timber. On 4 December 2000, the end purchaser of the timber from Yemen flew to the defendant's premises with the plaintiff's manager to inspect the timber for a second time. Again the end-buyer and the plaintiff's manager concluded that the timber did not conform to the specifications in the contract and had been injected with red dye.

[5] The timber remains to date on the defendant's premises. The plaintiff then commenced this action against the defendant for the return of the purchase price paid for the timber. Sometime in January 2001, the defendant appointed the Malaysian Timber Board ('MTB') to examine and inspect the timber in dispute. MTB concluded that the timber was of merchantable quality. In response to the plaintiff's claim for a return of the purchase price, the defendant counterclaims, maintaining that the plaintiff failed to take

delivery of the timber and is liable for storage and insurance charges incurred as a consequence of the plaintiff's action.

THE TRIAL

[6] The trial of this action took place over a period of six days in total. The plaintiff called three witnesses and the defendant, five. They were as follows:

(a) Motaher Saeed Noman Salem, PW1 who was the plaintiff's previous export manager of the Building Materials Department;

(b) Jamal Abdo Hayel Dhafir, PW2 who was the end-buyer of the timber comprising the subject matter of dispute;

(c) Marwan Ahmed Hael Saeed, PW3 who is the general manager of the plaintiff;

(d) Mohamed Shahir bin Jaffril, DW1 who is the Senior Quality Control Inspector at Malayan Timber Inspection Board ('MTIB')

(e) William Robson, DW2 who was a previous manager of the plaintiff stationed in East Malaysia;

(f) Cik Hajah Norchahaya bt Hashim, DW3 who is the Director of License and Enforcement in MTIB;

(g) Yap Keat Choon, DW4 who is the director and a manager of the defendant;

(h) Tan Yew Li, DW5 who is the defendant's mill manager.

THE ISSUES

[7] The key issues that fall for consideration are as follows:

(a) When, under the terms of the contract, did the property in the timber pass from the defendant seller to the plaintiff purchaser?

(b) Was the plaintiff's refusal to take delivery of the redwood timber on the grounds that it failed to conform to specification, justified or did it amount to a breach of the contract?

(c) Did the timber under TBR-122 conform to contract specifications?

(d) Is the defendant entitled to its counterclaim?

Issue (a): *When, under the terms of the contract did the property in the timber pass from the defendant seller to the plaintiff purchaser?*

[8] Prior to dealing with this issue, it is necessary to consider the general

law applicable in this case. The substantive dispute and thereby the cause of action arose in Sandakan, Sabah. The Sale of Goods Act 1957 is, under s 1(2) applicable in the States of Peninsular Malaysia, ie West Malaysia only. In Sabah and Sarawak, by virtue of s 5(2) of the Civil Law Act 1956 the applicable law for this dispute pertaining to the sale and purchase of goods is the equivalent English law at the corresponding time, namely the United Kingdom Sale of Goods Act 1979 ('SOGA 1979'). In *Low Hock Jee v Mayban Finance Berhad* [1996] 2 CLJ 479 Suleiman Hashim J held:

> ... The Malaysian Sale of Goods Act 1957 is not applicable to Sabah and Sarawak. By reason of s 5(2) of the Civil Law Act 1956, reference has to be made to s 12 of the United Kingdom Sale of Goods Act 1979, being the law applicable to Sabah and Sarawak with effect from 1 January 1980.

[9] Under the terms of the contract, the property being sold was redwood timber of a specified description and in a specified quantity. It was therefore a sale of unascertained goods. When does property and risk in these unascertained goods pass? The defendant contends that on the facts of the instant case, the property in the goods passed upon payment of the purchase price. This is evident from the exchange of correspondence between the plaintiff and the defendant. The purchase price was paid in two parts, thirty per cent at the commencement of the contract and seventy per cent one week prior to shipment. The balance purchase price was paid on 10 August 2000. Accordingly the defendant contends that property and risk in the goods passed to the plaintiff buyer on that date.

[10] The plaintiff buyer on the other hand maintains that property did not in fact pass on that date. The instant contract being an FAS contract, it is contended that property in the unascertained goods passes on delivery of the goods alongside the vessel prior to shipment. As the subject timber did not leave the defendant's premises to be loaded for shipment, the plaintiff maintains that the property in the goods remains with the defendant seller. Given these two competing contentions, what then is the position in law?

THE LAW

[11] The provisions of the SOGA 1979 ('the Act') are relevant. Section 18 r 5 of the Act which deals with the sale of unascertained goods provides as follows:

> (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state

A are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer, and the assent may be express or implied, and may be given either before or after the appropriation is made.

B (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract

C (3) ...

[12] Therefore on such a sale, prima facie, the property in the goods passes
D when goods of the description stipulated in the contract are unconditionally appropriated to the contract with the assent of the buyer. Such assent may be express or implied. It envisages that appropriation has been made in the manner contemplated by the parties. This prima facie position may be varied by the terms of the contract or by a reservation made by the seller in the act
E of appropriation, but that does not arise in the instant case. The general rule is that the property passes when the parties intend it to pass. In the present case, the sale being free alongside, the property prima facie passes when the goods are appropriated by delivery alongside in the implementation of the contract (see *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429).

F *Halsbury's Laws of England* (4th Ed, 2005 Reissue) Vol 41 sets out the position as follows at para 361:

> ... Under a free alongside contract (FAS) the seller undertakes to deliver the goods alongside the ship at his own expense. It is the buyer's duty to engage shipping
G space and to give the seller adequate notice, in so far as the contract does not itself indicate when, within the contract period, and where the goods are to be ready and alongside what ship. FAS contracts differ from the ordinary inland contract of sale in respect of the place at which delivery is to be made, which puts on the seller an item of cost over and above that of the goods themselves, and also prima facie, fixes the point at which the property passes and the risk falls on the buyer and the price
H becomes payable.

[13] The learned authors of *Benjamin's Sale of Goods* (4th Ed) state as follows in relation to the passing of property and risk in FAS contracts:

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> ... Generally goods sold under an FAS contract will be unascertained goods, and the passing of property will depend on unconditional appropriation to the contract. Goods are 'appropriated' in the contractual sense when the contract is

irrevocably attached to them, though the appropriation may not be unconditional for the purpose of passing the property because the seller has reserved a right of disposal. *Under an FAS contract, goods are commonly appropriated in the 'contractual' sense on delivery alongside, and, if that appropriation is 'unconditional' property and risk will pass at that point, before actual shipment* ...

[14] Given the foregoing, it cannot prima facie be assumed that property and risk passed upon payment of the balance purchase price on 10 August 2000. It would appear in the instant case that property in the goods did not pass from the defendant seller to the plaintiff buyer, until such time as the subject timber was delivered alongside a vessel nominated by the plaintiff buyer.

[15] As the subject timber was not delivered alongside a vessel, it would follow that property and risk in the goods did not pass from the defendant seller to the plaintiff buyer. The property and risk in the goods remained with the defendant seller.

[16] This is borne out by the evidence of both the plaintiff's and defendant's witnesses during trial. PW3 Marwan Ahmed Hael Saeed ('Marwan') testified:

Q: Upon paying the full purchase price who becomes the owners of the cargo?

A: The contract between the Plaintiff and Defendant was on terms of F.A.S. Sandakan. The price for the cargo is paid for the Defendant to deliver the cargo at Sandakan port. Therefore I believe the title and risk of the cargo only pass to the Plaintiff at Sandakan port and not on the date of full payment of the price.

[17] Yap Keat Choon, DW4 in the course of cross-examination testified as follows:

Q: And all expenses before the goods arrive in Sandakan are on the Defendant?

A: What kind of expenses. Our terms is F.A.S. We are only responsible for all charges only for F.A.S. F.A.S. means cargo will be ready at the vessel's side. All those expenses are to be borne by us. Everything else is borne by the Plaintiff including stevedoring...

[18] And further on at p 26 on 10 June 2009:

Q: All expenses up to bringing the goods alongside will be borne by the Defendant?

A: Yes

[19] At p 27 on 10 June 2009:

> Q: I put it to you the Plaintiff can reject the goods for any non conformity of the contract when the goods are delivered by the Defendant to the Plaintiff?
>
> A: Yes

[20] And further on at p 23 on 10 June 2009:

> Q: Under this contract TBR/122, the Plaintiff can make further inspection upon delivery of the goods at the Sandakan port?
>
> A: Yes

[21] And further on at p 27, question 6 on 10 June 2009:

> Q: I put it to you that the Plaintiff can reject the goods if there is any nonconformity of the contract when the goods are delivered at Sandakan port?
>
> A: Yes with the knowledge of the Defendants.

[22] It is therefore clear that property in the goods passes upon the goods being taken alongside the vessel in an FAS contract. As the subject goods were never taken alongside a vessel, the property in those goods, namely the timber remained at all material times in the instant case, with the defendant. As such the plaintiff was entitled to examine as well as reject the goods for non-conformity, up to that point of time.

[23] However a relevant issue that falls for consideration in relation to the above is the fact that delivery free alongside the vessel could not be undertaken by reason of the plaintiff's failure and/or refusal to nominate a vessel. Such refusal artificially delayed the passing of the property from the seller to the buyer, and such unwarranted delay is entirely due to the conduct of the plaintiff in refusing to take delivery of the subject timber. In this context, s 20 of the Act provides as follows:

> (1) Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:
>
> (2) *But where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault ...*

[24] It therefore follows from this that if delivery was delayed due to the fault of the buyer, the plaintiff in the instant case, the goods are at the risk of the plaintiff as regards any loss which might not have occurred but for such fault. In other words, if it is to be found that the delivery was delayed due to the fault of the plaintiff then the goods are at the risk of the plaintiff in so far as any loss has occurred. Such loss would be the losses suffered by the defendant seller in storing the subject timber and the costs of insurance for the timber. It is therefore imperative to consider whether the plaintiff is to be faulted for its refusal to take delivery of the timber or otherwise.

Issue (b): *Was the plaintiff's refusal to take delivery of the redwood timber on the grounds that it failed to conform to specification, justified or did it amount to a breach of the contract?*

[25] Accordingly, the next issue that falls for consideration is whether the plaintiff was at fault for delaying the delivery of the timber or whether the plaintiff was entitled to refuse to take delivery of the timber on the grounds that the timber did not conform to contract specifications. In order to determine this issue, it is necessary to consider the chronology of events leading up to the rejection of the subject timber by the plaintiff.

SALIENT FACTS

[26] The evidence led at trial divulged that prior to the subject contract dated 4 May 2000, identified as TBR-122/MSN ('TBR-122'), the plaintiff buyer had entered into contract No TBR-114/MSN dated 7 April 2000 ('TBR-114') with the defendant seller for the purchase of redwood of similar specification for shipment to Hodeidah, Yemen. This order was duly processed and shipped to Yemen in July 2000. On 28 August 2000 the plaintiff advised the defendant that it had received complaints of non-conformity of goods shipped in relation to the TBR-114 shipment of timber.

[27] Prior to this as set out earlier, there had been a delay in the production of the timber for TBR-122 as the Forestry Department had closed down timber factories in Sabah to undertake audit inspections. As a consequence the defendant seller was unable to produce the timber required for the contract by 19 July 2000. Notwithstanding the plaintiff seller's complaint that it had incurred dead freight charges, the plaintiff, by conduct, waived the delay and losses, if any, and agreed to arrange for the nomination of a vessel in August. On 1 August 2000 the defendant issued a facsimile to the plaintiff seeking the balance payment from the plaintiff in the sum of RM838,234.45.

[28] On the top left hand corner of this facsimile transmission, there is a note which reads: 'Mr. Mutaher, Please arrange vessel and pay accordingly'. A signature appears at the end of that statement, namely that of William Robson, DW2, with the date. At the bottom of this facsimile the handwritten note — 'for payment' appears. It is signed by Motaher Saeed Noman, PW1 ('Motaher'). On the same day the invoice for TBR-122 (exh P6A) issued by the defendant was also faxed to the plaintiff, comprising two sheets and setting out the sizes of the sawn timber in accordance with the specifications of the contract. The bottom half of the second page is blank save that it is stamped at the bottom with the defendant's stamp. However in the course of trial, the defendant produced a different copy of the same invoice, exh D50 which contained the following words on the bottom half of the second page:

> I have received and inspected the quality of the cargo in good condition.

It was signed by William Robson and dated 1 August 2000.

[29] It is notable that while exh D50 and exh P6A are the same document, the former has the annotation above written on it, while the earlier copy produced by the plaintiff has no such annotation.

[30] Finally on 1 August 2000, there is a further letter issued by William Robson who describes himself as a manager cum quality controller, who states that he has inspected the cargo for TBR-122 and found that it was in good condition and that the quality conforms to the requirements of the contract. The validity of this last letter is vehemently disputed by the plaintiff. The plaintiff maintains that this letter was produced subsequent to the commencement of proceedings by way of collusion between William Robson and the defendant. Their basis for so saying, which will be considered in greater detail subsequently, is that this document together with other such letters only came to light well after the commencement of proceedings. The plaintiff denies that it ever received these letters at the material time. The plaintiff also looks to the copy of the invoice issued to it by comparison with the invoice produced by the defendant at trial, one of which contains an endorsement by William Robson and the other which does not, as evidence of 'tampering' with the invoice by William Robson in conjunction with representatives of the defendant. The issue of 'tampering' will be considered elsewhere. For the purposes of ascertaining the current issue, namely whether the plaintiff was justified in withholding the taking of delivery of the timber, the foregoing facts are relevant in that they denote that as of 1 August 2000 the defendant had formally notified the plaintiff that the cargo was ready for delivery for shipment and that the balance purchase price was due.

[31] The plaintiff paid the balance purchase price on 10 August 2000. Thereafter on 28 August 2000 the plaintiff advised the defendant that the shipment of timber under TBR-114 was not in conformity with the required specification as the cargo was white/yellow in colour and contained dead knots, splits and wane. Additionally the plaintiff estimated that about 30% of the cargo was found to be dyed or injected with chemicals so as to appear red. The plaintiff immediately put the defendant on notice that it reserved full rights of action against it for the supply of defective or inferior goods. There was no response from the defendant.

[32] On 29 August 2000 the plaintiff wrote to the defendant again proposing that both parties engage the Malaysian Timber Inspection Board or MTIB as an independent inspector to undertake an inspection of the timber under TBR-114 which had been shipped to Hodeidah Port. Again there was no response from the defendant to this proposal.

[33] By reason of the problems with the timber shipped under TBR-114, which like the shipment under TBR-122 had been produced by the defendant, the plaintiff wrote to the defendant stating that it wished to re-inspect the cargo and that shipment would be postponed until further notice. They went on to state that they would arrange for shipment as soon as the cargo was found to be acceptable for shipment. Receiving no response to this letter, the plaintiff wrote again to the defendant reiterating that it would only arrange for shipment once the cargo was found to be acceptable. The plaintiff sought the defendant's confirmation in writing not to release the cargo to any other party until such re-inspection had been undertaken.

[34] On 8 September 2000, the defendant replied to the plaintiff's letter of 29 August stating that:

(a) the plaintiff's request to carry out re-inspection was not acceptable as the sawmill compound was congested;

(b) the cargo had been fully inspected by William Robson on behalf of the plaintiff who had confirmed that the cargo was in good condition and that the quality conformed to contract terms; and

(c) they required the plaintiff to advise them of the destination for the timber.

[35] On the same day, the defendant also wrote to the plaintiff separately on the issue of the rejected TBR-114 shipment stating that the shipment had

A been fully inspected by William Robson who had rejected certain timber and found the rest to be of good quality. In short the defendant maintained that the plaintiff had not complained about the timber up to the point of shipment and accordingly their allegation of non-conformity could not be entertained.

B

[36] On 11 September 2000, the plaintiff wrote back to the defendant requiring nonetheless that the defendant consent to the appointment of another grader, one SGS Sdn Bhd to undertake an inspection of the subject timber prior to shipment. The defendant replied on the same day, stating that C as far as it was concerned, the plaintiff's representative had confirmed that the quality of timber under TBR-122 conformed to contract specifications. The defendant conceded that as the cargo belonged to the plaintiff, the plaintiff could do as it saw fit, but if it failed to advise the defendant of the requisite destination within a period of fourteen days, the defendant would commence D to levy storage charges. In short the defendant refused to be party to any further inspection on the grounds that the plaintiff had already exercised its right of inspection vide William Robson. It is also evident from this letter that the defendant was taking the position that property in the goods had passed to the plaintiff.

E

[37] Next, the plaintiff arranged for SGS Sdn Bhd to undertake an inspection of the timber under TBR-122 on 13 September 2000. Nothing however came of this. SGS advised the plaintiff that they had received no co-operation from the defendant who had indicated that it would not provide F the manpower or equipment required to effect an inspection. The plaintiff therefore sent Motahar, the export manager and the person who liaised with the defendant to inspect the timber at the defendant's premises. The inspection or re-inspection was duly undertaken on 25 September 2000. On 26 September 2000, Motahar advised the defendant in writing that he found G that the majority of the cargo was white and not redwood. He also maintained that the cargo was coloured/injected with red dye to look as though it was redwood when it was in fact white wood. He stated that the cargo did not conform to the requirements of the contract and that therefore the plaintiff could not accept the cargo.

H

[38] In the course of his testimony Motahar was cross-examined about how he inspected the timber under TBR-122. He stated that he saw a 'lot of white and yellow species'. He could not confirm that he examined up to fifty per cent of the cargo. He was asked whether he took out the bundles of stacked I wood singly and examined them to which he replied that he did not, as it

would have taken him days to do so. He only stated that he inspected 'many' bundles. When it was put to him that he me merely inspected the timber cursorily, he maintained that there was a 'lot of yellow and white species'. He also pointed out that he had tried to procure an independent grader to carry out the inspection. It was finally put to him that he could not have inspected the entirety of the timber as it took MTIB two weeks (although MTIB subsequently gave evidence that they completed their inspection in four days). Motaher disagreed that he did not undertake a thorough survey.

[39] On 26 September 2000, the same day that Motahar wrote complaining about the non-conformity of the TBR-122 shipment, the defendant wrote to the plaintiff stating that as the plaintiff had failed to advise of the destination for the cargo, the defendant would be levying a storage charge of RM2 a day until the cargo was removed.

[40] The plaintiff then sought to resolve this matter by meeting up personally with the defendant's associate company in Kuala Lumpur, Aik Bee (Kepong) Sdn Bhd. The parties met and the plaintiff sought to persuade the defendant to either replace the timber that did not conform to the contract or to replace the entirety of the timber with timber from the defendant's associate company in Sarawak or alternatively to seek a refund of the full purchase price. The parties failed to resolve this issue.

[41] On 12 October 2000 the defendant wrote to the plaintiff maintaining that the cargo was ready for shipment having been inspected by William Robson, the plaintiff's agent, who had also accepted delivery of the cargo.

[42] They therefore maintained that they were not liable for deterioration in the cargo and would be charging the plaintiff for storage. The plaintiff replied on 24 October 2000 and maintaining that as the contract for sate of the timber was an FAS. contract, the responsibility for the custody of the timber lay with the defendant. The plaintiff further proposed that the parties appoint MTIB to verify the quality of the timber. To this end the plaintiff wrote to MTIB on 25 October 2000. The defendant rejected the plaintiff's proposal vide their letter of 9 November 2000, stating that the property in the cargo had passed to the plaintiff. More significantly they stated that they were unable to agree to any arbitration by MTIB as the quality of the wood was no longer in issue as William Robson had inspected and accepted the cargo on behalf of the plaintiff. In response to this letter the plaintiff wrote to the defendant on 17 November 2000 setting out the entire history of the transaction and finally rejecting the 1,301.5513 tons of timber for

non-conformance with the contract specifications. They demanded a return of the purchase price in the sum of RM1,197,462.61.

[43] On 4 December 2000, notwithstanding that rejection of the goods had been communicated by the plaintiff to the defendant, the end buyer for shipment TBR-122, one Jamal Abdo Hayel Dhafer, PW2 ('Jamal Abdo') travelled from Yemen to Sabah to inspect the timber together with Motahar in a final attempt to resolve the issue. He too testified that the cargo that he inspected was unsatisfactory in that it had been injected with red dye, contained white and light species of wood and contained splits and wane. He was unable to accept the timber.

Was the plaintiff justified in delaying the taking of delivery of the timber under TBR-122?

[44] The issue of whether the plaintiff was justified in delaying the taking of delivery of the timber under TBR-122 turns on:

(a) whether the property in the goods had passed to the plaintiff;

(b) whether the plaintiff was accorded an opportunity to examine the goods prior to shipment;

(c) whether the plaintiff was entitled to re-inspect the goods after William Robson had done so, as a consequence of the defects complained of under TBR-114;

(d) whether in the face of the defendant's refusal or reluctance to allow a further re-inspection, the plaintiff was entitled to delay delivery.

[45] Each of these matters is considered in turn.

With respect to (a): Whether the property in the goods had passed to the plaintiff

[46] As discussed under para 4, in an FAS contract the property in the goods passes from the defendant seller to the plaintiff buyer on delivery alongside a vessel nominated by the plaintiff for delivery. In the instant case, as the subject timber did not leave the defendant's premises, it would appear that the property in the timber did not pass to the plaintiff, but remained with the seller, notwithstanding the payment of the full purchase price. Therefore as of 10 August and thereafter, the property in the timber remained

with the defendant. If the timber had been transported alongside any vessel, property would have passed to the plaintiff.

With respect to (b) and (c): Was the plaintiff accorded an opportunity to examine the goods prior to shipment? Was the plaintiff entitled to re-inspect the goods after William Robson had done so, as a consequence of the defects complained of under TBR-114?

[47] From the testimony of William Robson, DW2, it was evident that he was the plaintiff's representative in Sabah for many years. It was a part of his duties to liaise with the sellers and to ensure that the requisite cargo was ready for loading and shipment and to arrange with the plaintiff for payment. In the course of his duties it is indisputable that William Robson did indeed have sight of and inspect the cargo. What is in issue is whether William Robson was in a position to sufficiently grade and vouch for the quality of the timber to the extent that the plaintiff is estopped from further examining the timber.

[48] For the defendant, reliance was placed on the course of duties undertaken by Robson throughout his tenure as a manager as well as his job scope which appeared to include checking the quality of the cargo and ascertaining cargo readiness (see exhs P22 and P44). The plaintiff on the other hand maintained that Robson was not authorised to, nor did he possess any sort of grading expertise entitling him to decide whether the timber matched or conformed to contract specifications.

[49] To my mind the issue that arises for consideration is whether the plaintiff is estopped from re-inspecting the goods as a consequence of William Robson's prior inspection of the same, notwithstanding that there had been complaints about the shipment under TBR-114 which had also been similarly inspected by Robson. Moreover this issue is inextricably tied up with the passing of property in the subject timber.

RIGHT OF INSPECTION

[50] The plaintiff's right of inspection is statutorily provided for under s 34 of the Act:

> Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the

A contract [and in the case of a contract for sale by sample, of comparing the bulk with the sample.]

[51] Applying the foregoing to the instant case, it follows that as the property in the goods remained with the defendant seller until delivery alongside a vessel, the timber had not been delivered at the time when William Robson examined the same. Therefore Robson examined or inspected the goods prior to delivery and prior to acceptance of the timber.

[52] It further follows that if and when the defendant effected delivery of the goods to the plaintiff by taking the goods alongside a vessel, the defendant was bound on request to afford the plaintiff a reasonable opportunity of examining the goods for the purposes of ascertaining whether they were in conformity with the contract.

Was there acceptance of the goods?

[53] The law relating to acceptance of the goods is set out in s 35 of the Act:

(1) The buyer is deemed to have accepted the goods [subject to subsection (2) below —

(a) When he intimates to the seller that he has accepted them, or

(b) When the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.

(2) Where goods are delivered to the buyer, and he has not previously examined them he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose —

(a) of ascertaining whether they are in conformity with the contract, and

(b) ...

(3) ...

[54] As there was no delivery of the goods by the defendant to the plaintiff in the instant case, the plaintiff had not accepted the goods when Robson examined those goods at the defendant's premises. Such an examination was undertaken prior to delivery, and prior to the passing of property from the

seller to the buyer. Accordingly it would follow that the plaintiff, notwithstanding Robson's inspection or examination, would continue to be entitled to examine the goods up until such time as the goods were delivered alongside a vessel in accordance with the terms of the FAS contract. Such a conclusion is further fortified by sub-s (2) which provides that unless otherwise agreed, the defendant is bound on the request of the plaintiff to allow the plaintiff a reasonable opportunity of examining the goods for the purposes of ascertaining conformity when he tenders delivery. Therefore it follows that the plaintiff is entitled to be accorded a reasonable opportunity for inspection or re-inspection of the timber up until such time as the goods are taken alongside the vessel for delivery, unless otherwise agreed. The contract makes no provision otherwise. As such the plaintiff was entitled to ask for a re-inspection or examination of the subject timber up to the point of delivery alongside. As the goods did not leave the defendant's premises, the plaintiff was entitled to ask for a re-inspection of the timber to ensure conformity with the contract.

[55] If the goods had been taken alongside a vessel or placed for shipment on board a vessel and sent to Yemen, the position would have been different. In such an instance, the property in the goods would have passed to the plaintiff and as the plaintiff had then proceeded to ship it to Yemen, the plaintiff would have accepted the timber and could not afterwards reject it (see *Perkins v Bell* [1893] 1 QB 193). However in the instant case, as the timber had not been taken alongside, the plaintiff was still entitled to examine it and reject the timber for non-conformity with the contract, notwithstanding Robson's earlier examination or inspection.

COMPLAINT OF DEFECTIVE GOODS IN RESPECT OF PRIOR SHIPMENT

[56] The issue that was specified under this heading was whether the plaintiff was justified in asking for a re-inspection. Apart from the plaintiff's statutorily ensconced rights under s 34 of the Act, the fact that the plaintiff had received complaints of defective goods in respect of a greatly similar contract of redwood certainly afforded sufficient basis for the plaintiff to insist that the timber under TBR-122 be inspected prior to shipment to the end buyer in Yemen. Even without a survey report, and on the strength of the complaint alone, there were sufficient grounds afforded to the plaintiff as a prudent purchaser who intended to on-sell the timber to an end buyer, to exercise caution and further examine and inspect the timber that had been approved by its representative, William Robson. The apparent defects in TBR-114 afforded sufficient reason for re-inspection.

A THE DEFENDANT'S STANCE

[57] However, from the evidence it appeared that it was the defendant who sought to arbitrarily preclude the plaintiff from exercising its rights of examination of the cargo for conformity with the contract. The defendant's stance was that property in the goods having passed to the plaintiff on payment of the purchase price, the risk in the property also passed to the plaintiff at that point. From the defendant's point of view the plaintiff's right of examination of the goods was undertaken by Robson vide his examination prior to, and on 1 August 2000 which he followed up with letters. As such the defendant maintained that the plaintiff had effectively accepted the goods as a consequence of the inspection of the goods by Robson, followed by the payment of the purchase price, as a consequence of which the property in the goods passed to the plaintiff. As such at the point when the plaintiff sought a re-examination, the defendant maintained that it was too late for a further examination and possible rejection, as property in the goods had passed to the plaintiff. In short the defendant maintained that it was too late for the plaintiff to reject the goods as the plaintiff had effectively accepted the same through its agent, Robson.

[58] However the fallacy in this line of reasoning is that the property in the goods had not passed to the plaintiff as yet. Moreover, by reason of both s 34 as well as the apparent defects raised in respect of TBR-114, the plaintiff was entitled on request to be accorded a further opportunity to examine the goods for conformity.

[59] However the plaintiff was refused any such opportunity despite numerous requests. While on the one hand maintaining that the property in the goods had passed and that the plaintiff could do as it wished, the defendant refused to cooperate with any independent grader or surveyor to allow an independent inspection of the goods at the material time, namely between 28 August and 17 November 2000 when the goods were finally rejected by the plaintiff. The consistent refusal of the defendant to allow such inspection amounts to a breach of its duty and obligations under the contract of sale. The defendant's refusal was unjustified and appeared to have no rational or conscionable basis. The defendant's stance that there was no space for an independent survey to be conducted was untenable, particularly as just such an inspection was undertaken subsequently by the defendant itself in January 2001. It can only be concluded from the defendant's unreasonable refusal that there might well have been basis in the plaintiff's complaint that the goods were indeed not in conformity with the contract, or defective.

Did the timber under TBR-122 conform to contract specifications?

[60] The evidence substantiating the quality and condition of the timber at the material time during the contract, emanates primarily from Motahar, the plaintiff's export manager, Abdo Jamal, the end-buyer and William Robson, the plaintiff's resident manager in East Malaysia. Both Motahar and Abdo Jamal were consistent in their testimony that the wood was defective in that it comprised wood of light and yellow species as well as wood that had been injected with red dye to make it appear like redwood.

[61] William Robson however was adamant that the wood conformed to contract requirements, namely that it had not been injected with red dye and contained no splits or wane or decaying wood. How then was the court to determine the truth of matters?

ROBSON'S LETTERS ON THE QUALITY OF THE TIMBER

[62] In view of the differing versions as to the quality of the wood, it was necessary to look to the entirety of the testimony of the three witnesses to ascertain which was to be preferred. It was evident from William Robson's testimony that he had left the plaintiff on bad terms. While the letter of termination stipulated that his services had been terminated because he had failed to disclose his true age in his application for the position, and in fact held out that he was considerably younger, Robson testified that the real reason for his dismissal were the problems that had arisen with the shipment of timber under TBR-114. Robson stated that he had clarified prior to his appointment, his true age, and that the plaintiff knew this all along.

[63] The plaintiff on the other hand maintained that Robson had colluded with the defendant to produce evidence at this trial which would serve the defendant's contention that the quality of the goods was in conformity with the contract. In support of this contention as set out earlier, the plaintiff on the fact that the letters relating to the alleged quality of several shipments including TBR-114, TBR-121 and TBR-122 had only been sighted for the first time by the plaintiff's solicitors during the course of pretrial discovery. At no time prior to that, even when the parties were exchanging correspondence prior to the institution of this suit, did the defendant make reference to these letters stating that the plaintiff had vide William Robson accepted the quality of the timber as conforming to contract specifications. The plaintiff had no records of any such letters and indeed had lodged reports with the police about the lack of authenticity of the same.

[64] Secondly, the handwriting of William Robsson which appeared on one copy of the same invoice in exh D50, but not on exh P6A (at pp 11–12 of the agreed bundle of documents), suggested that the handwriting had been inserted subsequently and for the purposes of trial to bolster the defendant's position. It was further pointed out that the logo on the letter head utilised by William Robson did not match the corresponding logo utilised by the plaintiff at the material time. Additionally it was curious why the letter marked as exh D45 was addressed to the defendant. If its purpose, as testified by Robson and DW4 was to procure payment, then it should have been addressed to the plaintiff. Why would Robson, who was the plaintiff's agent, have written to the defendant to confirm that he had inspected the cargo and found it to be in good condition, when his duties were to liaise with the plaintiff and to advise the plaintiff to make payment to the defendant? The plaintiff maintained that there was no necessity for Robson to write to the defendant but that the letters, if bona fide, ought to have been sent to the plaintiff, as Robson had to advise the plaintiff on cargo readiness and payment.

[65] To this, Robson maintained that the letters were confirmation of quality by the plaintiff to the defendant, to enable payment to be made. The defendant, through its sole witness, Yap Keat Choon, DW4 ('Yap') maintained that these letters were necessary in order to procure the plaintiff's consent to payment. However there was nothing to show that these letter had actually been sent to the plaintiff to effect payment. Finally Robson was queried as to the letterheads he has utilised, as the plaintiff had ceased to use the address stated and those letterheads for some time prior to the issuance of those letters. Robson countered this by saying that he merely used old letter heads in the form of a writing pad that had been left with him by the plaintiff

[66] The entirety of the evidence on this issue was carefully and anxiously considered. Having done so, it appears to be difficult for this court to conclude with any degree of certainty that the letters authored by Robson in relation to the quality of the timber under TBR-114, TBR-121 and TBR-122 were authentic and had been produced or authored during the normal course of Robson's duties. This is because of the anomalies stated above, namely that while Robson's handwriting appeared on one copy of an invoice issued by the defendant, ie exh D50, it did not appear on the other identical copy, P6A. It was also evident that the letters issued by Robson were not in the plaintiff's records. I accept the plaintiff's version of events that these letters first came to light only after the commencement of these proceedings, during discovery. As such the integrity and veracity of these letters is doubtful.

[67] On the other hand, there was insufficient evidence adduced to show that the defendant had colluded with Robson to produce the subject letters. In light of these findings, the court concluded that the letters produced by Robson relating to the quality of the timber, namely exhs P24, P45 etc, would be ignored and would not be taken into consideration in determining the issues in this case.

[68] Even if I am incorrect in my conclusion it is to be borne in mind that these letters in themselves, did not determine conclusively that the quality of the timber conformed to contract specifications. At best they showed that an inspection had been carried out and that in Robson's view they conformed to contract specifications. But it does not comprise conclusive evidence that the goods corresponded with the contract description.

[69] Neither did these letters act to preclude the plaintiff from exercising a further right of inspection or examination as a consequence of the complaint of defective goods in respect of the shipment under TBR-114. In fact, Robson's earlier handwritten statement on the defendant's facsimile of 1 August 2000, exh P6A, which is not in dispute, amounts to a clear indication to the plaintiff that the cargo was ready for shipment and that payment should be made. From this it is evident that Robson did in fact inspect or examine the goods or satisfy himself of cargo readiness. To that extent Robson's statements or acts, as an agent of the plaintiff, are binding on the plaintiff. However notwithstanding his approval of cargo readiness and payment of the balance purchase price, this does not detract from the fact that at that point in time, property in the timber had not passed to the plaintiff buyer. Neither did Robson's examination of the goods preclude the plaintiff from exercising a further right of examination in view of the fact that property in the goods had not passed to the buyer, and as a credible complaint of non-conformity to contract had arisen in respect of a similar contract for the supply of redwood to Yemen under TBR-114.

Was the plaintiff accorded a reasonable opportunity to re-inspect or examine the timber under TBR-122?

[70] In other words, Robson's letters did not impinge on the primary issues at hand, namely when the property in the goods passed, and whether the plaintiff was accorded a reasonable opportunity to examine or re-inspect the goods after Robson had done so. As I have concluded earlier, the goods were not unconditionally appropriated to the contract by delivery of the goods

alongside a vessel, and therefore property in the goods remained with the defendant seller even after inspection by Robson. As such the plaintiff remained at liberty to inspect or re-inspect or examine the goods even after Robson had done so. The plaintiff was justified in delaying the delivery of the timber shipment in light of the defects complained of in TBR-114. The plaintiff was entitled to have an independent grader/surveyor inspect the goods prior to shipment, which opportunity was unreasonably refused and withheld by the defendant seller.

[71] The defendant's conduct in so refusing the plaintiff a reasonable opportunity to inspect the goods under TBR-122 amounts to a breach of the contract of sale. The plaintiff was therefore entitled, in the face of such breach to treat the contract as being discharged and to reject the cargo. This, the plaintiff was entitled to do, because it was effectively precluded from exercising its right of acceptance or rejection on the basis of the quality of the timber. The plaintiff however did not do so, as is evident from the chronology above. Instead, the plaintiff sought to persuade the defendant to change its mind about an independent grader or surveyor. When it failed to succeed, Motahar went to the defendant's premises to inspect the timber himself and testified that on examination he found the timber not to be in conformity with contract specifications, which, the plaintiff contended amounted to a further, and significant breach.

Issue (c): *Did the timber conform to contract specifications?*

[72] The relevant provision in TBR-122 specifying the description and quality of the timber reads as follows:

(a) Quantity: 1,301.5513 Metric Tons, 1,975 Bundles 100% Redwood OT (Redwood) Hard Redwood Full Sawn Timber Merchantable Grade

(f) Specifications: Free from white/yellow light species, decay/dead knots, splits and wane

[73] The issue for consideration here is whether the contract specifications as to 100% hard redwood merchantable grade free from white/yellow light species, decay/dead knots, slits and wane comprises a condition of the contract, or a warranty.

[74] The plaintiff contends that the stipulations above comprise an express term and therefore amount to a condition of the contract of sale under TBR-122. In this context s 11(3) of the Act provides:

> whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.

[75] In *Bentsen v Taylor, Sons & Co (2)* [1893] 2 QB 274; 7 Asp MLC 281 Bowen LJ held:

> there is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which other party is relieved of his liability.

[76] In the instant case, it appeared to this court from the evidence of Motahar, Abdo Jamal, Robson as well as DW4, that the parties understood that it was a fundamental term of the contract that the timber supplied by the defendant would conform to the description of hard redwood full sawn timber of merchantable grade which was free from white/yellow light species, decay/dead knots, splits and wane. This is evidenced in the correspondence between the parties and the descriptions given by these witnesses when testifying as to the condition or quality of the wood. It is in fact the defendant's stance that the timber at all times conformed strictly to these contract specifications. It therefore follows that both the plaintiff and the defendant comprehended and treated the stipulation in TBR-122 as a condition of the contract of sale, the breach of which gave rise to a right to treat the contract as repudiated, and to reject the goods as specified under s 11(3) of the Act. In arriving at such a conclusion, I bear in mind the words of Lord Wilberforce in *Bunge Corp v Tradax SA* [1981] 2 All ER 513 'Courts should not be too ready to interpret contractual clauses as conditions' but went on to say that he did not doubt 'that in suitable cases the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition ...'.

[77] The net effect therefore is that the defendant was bound under the terms of TBR-122 to comply strictly with the condition set out there, namely that the entirety of the timber should comprise redwood of a merchantable

quality with no light or yellow species and no split or wane or decay. A breach would entitle the plaintiff to treat such breach as repudiatory, and to reject the contract.

THE POSITION AT COMMON LAW REGARDING THE CONTRACT SPECIFICATIONS UNDER TBR-122

[78] The plaintiff alternatively contends that under common law, TBR-122 was a sale by description, which the defendant failed to provide. It is submitted that the goods supplied must comply with the contract description set out in the contract. As TBR-122 contained an express term relating to the timber specifications, it amounted to a condition to be fulfilled by the defendant. The test to ascertaining whether such description amounts to a condition is that 'every item in a description which constitutes a substantial ingredient in the identity of the thing sold is a condition' (see *Couchman v Hill* [1947] 1 All ER 103 per Scott LJ). This was approved by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570. Further applications of the principle can be found in *Tradax Export SA v European Grain & Shipping Ltd* [1983] 2 Lloyd's Rep 100 where a clause referred to the goods as 'Goods in bulk U.S.A. solvent extracted toasted soyabean meal — maximum 7.5% fibre', it was held that '7.5% fibre' was part of the description. In *Toepfer v Warinco AG* [1978] 2 Lloyd's Rep 569, it was held that in a sale of soya bean meal the word 'fine ground' was a word of description, with the result that coarse-ground meal could be rejected. In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 3 All ER 570 Lord Wilberforce thought some of the older cases were 'excessively technical and due for fresh examination in the House of Lords' and at best was prepared to accept them as relating to 'unascertained future goods as to which each detail of the description must be assumed to be vital'. These cases support the proposition that every item in the contract constituting a substantial ingredient in the identity of the goods sold amounts to a condition.

POSITION UNDER THE SOGA 1979

[79] Section 13 deals with the principles in relation to a sale of goods by description:

13 Sale by description

(1) Where there is a contract for the sale of goods by description there is an implied term that the goods will correspond with the description.

(1A) As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition.

[80] It follows therefore that where the goods do not conform to description the buyer is entitled to refuse to take delivery or receive such goods, which are not what he contracted to purchase. The issue here is whether TBR-122 amounts to a contract for the sale of goods by description. A sale is not by description merely because descriptive words are used during the negotiations. In order to fall within the purview of s 13, the buyer must rely on that description in making the contract of sale. This must therefore be a matter of interpretation of contract. In *Ashington Piggeries Ltd & Anor v Chirstopher Hill Ltd* [1971] 1 All ER 847 which relates to the sale of unascertained goods, Lord Diplock held:

> ... 'description' by which unascertained goods are sold is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied ... Ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from those he had agreed to buy. The key to s 13 is identification ...

[81] Applying the foregoing test to the instant case, it follows that the words 100% hard redwood merchantable grade, free from yellow/white light species and free of splits and wane, decay/dead knots, splits and wane are words used by the plaintiff and the defendant to identify the kind of goods to be supplied. It therefore follows that under s 13 of the Act it was an implied term that the defendant would supply timber of the aforesaid identity to the plaintiff.

Did the timber produced for TBR-122 comply with contract specifications?

[82] Having ascertained that the contract specifications in TBR-122 amounted to a condition, it is next necessary to consider as a matter of fact whether the timber under TBR-122 conformed to contract specifications. In order to ascertain this, it is necessary to consider the competing testimonies of Robson as compared to that of Motahar and Jamal Abdo on the condition of the wood. Jamal Abdo as the end-buyer it will be recalled had flown in from Yemen to examine the wood on 4 December 2000 and he concurred with Motahar that the wood was not in conformity with the contract. Being the end-buyer there was no reason for Jamal Abdo to testify otherwise than truthfully about the condition of the wood. While Motahar's testimony in relation to the quality of the wood was credible, he represents the plaintiff.

A He described his inspection on 25 September 2000 in examination-in-chief as follows:

> ... Upon inspection of the cargo, I found that the majority of the cargo was white not Redwood and the Cargo was coloured in red dye in order to look as though it is redwood which in fact is white wood. I was startled by these findings. It was obvious the Cargo was not cut according to the Plaintiffs required quality as per the Contract.

B

[83] In the course of cross-examination, Motahar stated that he had no special qualifications in the grading of timber but that he had considerable experience. In cross-examination he maintained that he inspected the timber and saw a lot of white and yellow species. He was unable to specify whether 50% of the cargo was bad because the timber was scattered. He explained that when he saw the timber it was bundled and stacked but not covered.

C

D

[84] As for his second inspection together with Jamal Abdo, he explained that the trip was made as the plaintiff wanted his opinion as to whether he would accept the cargo. Abdo made it clear that he would not accept the cargo.

E

[85] In re-examination he explained that he could ascertain the quality of the wood with his naked eye. He could see whether the colour of the wood was red or white and yellow, and whether there were splits or wane. He further explained that he scratched the wood and found, upon scratching that it was white. He also saw red chemical dye. If it was natural redwood it would remain red when scratched. He spent about five to six hours checking the bundles of timber. This he stated was sufficient time for him to assess whether the cargo was good or bad. For more detailed analysis, professional independent surveyors would have to conduct the inspection.

F

G

[86] Jamal Abdo testified that he inspected the cargo for about four or five hours. He chose seven bundles of timber randomly with a view to ascertaining the quality of the timber. He testified under cross-examination as follows:

H

> ... I have seen some reddish colour on the timber. On some sides it is yellow and other side is red meaning it is stained. If you scratch with a key or nail you will find it is yellow.
>
> Q: How many did you scratch?
>
> A: Many. Maybe more than ten times scratching the timber itself. I cannot remember exactly ...
>
> Q: With your visual examination, you found there is a lot of bundles were also red hardwood.

I

A: There was.

Q: You said well, if you segregate then you will buy.

A: Yes

Q: Not all the cargo is white and yellow; there was hard redwood?

A: It was heavy on white and yellow. From the bundles I checked.

[87] It was also put to Jamal Abdo that he checked less than 0.1% of the timber. While it is true that he did not physically check the majority of the timber, it was evident from his testimony that he was unwilling to accept the timber for lack of conformity. It was equally clear that he was prepared to assist in resolving the issue of quality by having flown out from Yemen to inspect the goods and from his offer to accept the goods provided the defective or inferior portions were segregated and replaced.

[88] William Robson gave evidence that he inspected the timber produced for TBR-122 on 1 August 2000. He explained that as with the earlier contracts, he examined the timber which was in loose pieces, piece by piece and stacked them into bundles with the assistance of the defendant's workers. There the workers will do the strapping, painting the end colours and shipping marks. Then Robson explained that he would re-examine the timbers that were stacked into bundles to re-ensure that all bundles are in good order.

[89] In cross-examination, he explained how he inspected the timber produced for TBR-122:

> The timber was cut to size by the bensaw. From the bensaw they do the prime grading. From there it is taken to the open area with a forklift. They will do a further selection of the timbers. I am there ail the time. Once in the area they put the logs on stickers to leave air flow for drying. It may take one or two days to dry depending on the weather. Then the forklift will take the logs to the grading area again. There I will have a team of about ten people to select the timber. So for one lot of timber there are two lots of men to assist me to carry the timber piece by piece. If they find anything defective they will weed it out. Once I am satisfied, I will take the bundle to the packing area. In the packing area, there are packers who pack the timber with steel strapping and paint the end colours and in the centre the name, once this is finished I come around again to do the final inspection. From there the forklift will remove the bundle to the storage area. That is final. I count the timber and note it in a notebook. I check against the packing list and the notebook to match sizes. The sizes are all fixed sizes. We wait for the barge ...

[90] From Robson's testimony as a whole, it transpires that he testified that he examined every single piece of wood. He also stated that he did this on 1 August 2000. It is evident from the testimony of all other witnesses, even the MTIB experts that no-one else examined every single piece of the timber. It is also in evidence that to so examine every piece would take more than one day, possibly weeks. This follows from MTIB's estimation. Without examining every single piece of wood, they still required four days and four men to estimate the quality of the timber under TBR-122. It is therefore highly unlikely that William Robson alone, managed to examine every piece of timber as he stated.

[91] The situation became even more perplexing in the course of cross-examination. His explanation above suggests that the process which he claims to have witnessed from inception to the end, takes some considerable time, and certainly not one day. His description of being present throughout the entire production process does not appear to be credible.

[92] Given the improbability of William Robson's evidence, it appeared to this court that the evidence Jamal Abdo and Motahar were entirely more credible. As explained earlier Jamal Abdo was an independent witness keen on procuring the redwood he had contracted for, so long as it matched contract specifications. As for Motahar, although he worked for the plaintiff at the time, he had as of 26 September 2000 sent a contemporaneous letter setting out his complaints with regards to the timber supplied for TBR-122. This existence of this contemporaneous note supports his testimony.

[93] Finally with regards to William Robson, it was evident that he held a grudge against the plaintiff. He complained of termination without just cause or excuse. His evidence on the quality of the wood under TBR-122 had therefore to be treated with caution, more so because of my conclusions above in relation to the letters issued by him to the defendant relating to the quality of timber under TBR-114, TBR-121 and TBR-122. Given the doubt arising about the date of authorship of those documents, their very existence suggests that Robson was intent on testifying that the timber conformed to specifications. Given these matters, I found his evidence to be less than reliable and preferred that of Motahar and Jamal Abdo. I therefore conclude after deliberation on the evidence of these three witnesses on the issue of the quality of the timber under TBR-122, that on the evidence of Motahar and Jamal Abdo, the timber was not in conformity with the contract when it was inspected on 25 September 2000 and subsequently on 4 December 2000. Both these witnesses concurred that red dye had visibly been injected into the wood and that the wood contained light and yellow species as well as splits and wane.

THE MTIB REPORT

[94] However that was not the only evidence on the quality of the timber under TBR-122. It will be recalled that MTIB examined the timber on the defendant's premises between 15 and 19 January 2001 and concluded that the timber conformed to specifications for redwood merchantable grade. The report found that 'as a result of their inspection, they had found that the quality and type of wood meets the specification of redwood merchantable grade'. DW1 who examined the timber himself stated in his report that he examined 2208 pieces and of that number he found that five pieces did not qualify as red hard wood. He estimated that on a random basis, less than 1% would not be acceptable as red wood. In short MTIB supported the defendant's case that the timber conformed to contract specifications up to the extent of 99% of the cargo.

[95] It will also be recalled however, that the plaintiff had in October, sought to procure the defendant's consent to engaging MTIB to conduct an independent survey of the subject timber. The defendant at that point refused, maintaining that there was no issue of quality as the plaintiff's representative had inspected and accepted the cargo. However after the rejection of the cargo by the plaintiff on 17 November 2000 and after the plaintiff's intimation of legal proceedings, the defendant on 10 January 2001 wrote to MTIB requesting that MTIB carry out an inspection of the timber for TBR-122. It is noteworthy that the defendant did not advise the plaintiff that it was doing so.

[96] The defendant's conduct in adamantly refusing MTIB's services in the course of October and November and then suddenly solely procuring MTIB to undertake an independent inspection warrants careful consideration. While a joint inspection was refused at the material time, the defendant subsequently and of its own accord sought to have such an inspection undertaken. This in itself points to the unreasonableness of the defendant in failing to allow the plaintiff to undertake a joint inspection.

[97] More significantly it points to the fact that the defendant, now under threat of legal proceedings, decided to bolster its position by arranging for an inspection, but without the plaintiff's participation or knowledge. To my mind, this subsequent arrangement for an inspection throws doubt on the bona fides of the defendant. It appears to be an attempt to organise matters such that the timber was found to be in conformity with the contract. In any event, as the plaintiff was not afforded a reasonable opportunity at the material time to inspect the timber, this subsequent inspection ought not to be accorded consideration, because it is not evident that the timber that was

A inspected by the MTIB personnel and experts, was indeed the same timber that was inspected by Motahar and Jamal Abdo on 25 September 2000 and 4 December 2000.

B **[98]** The plaintiff was not accorded an opportunity to examine the goods prior to delivery and acceptance. The defendant's refusal to allow the plaintiff an opportunity to examine the goods at the material time was wrongful. The plaintiff was therefore entitled to refuse to accept delivery of the goods.

C **[99]** When this is considered together with the rest of the evidence at the material time relating to whether the timber conformed to contract specifications, namely the evidence of Motahar and the end-buyer as well as Robson, the clear conclusion that follows is that the timber failed to conform to contract specifications. As those specifications amounted to a term of the D contract of sale, the plaintiff was entitled to refuse to accept the goods, or put another way, to reject the goods, which it did on 17 November 2000.

[100] As such the defendant's evidence as to the condition of the goods E undertaken well after rejection is not relevant for the purposes of ascertaining the quality of the goods at the material time namely between 28 August 2000 and 17 November 2000.

F **[101]** I am further fortified in my conclusion above, by the fact that despite procuring an MTIB report stipulating that the timber conformed to specifications, the defendant chose not to forward the said report to the plaintiff so as to show that the timber was in conformity with the contract. If indeed the MTIB report had been commissioned by the defendant for the G purposes of procuring an independent opinion on the quality of the wood, there is no reason why the defendant should have so vehemently opposed such an inspection at the material time, and subsequently about one month later embarked on precisely the same course of action, but without the plaintiff's participation or knowledge. This too suggests that the report was H prepared purely for the purposes of litigation. There is nothing to denote that the timber examined was exactly the same timber that was inspected by Motaher and Abdo Jamal. The defendant maintains that the timber is the same timber by reason of the shipping marks painted on the ends, but this in itself does not preclude the possibility of a merchantable quality redwood I replacing defective timber. While there is insufficient evidence to suggest any such replacement, the conduct of the defendant in vehemently refusing a joint inspection then subsequently commissioning a private report without the plaintiff's knowledge or participation shows that the defendant was intent on bolstering its stand for the purposes of litigation. In conclusion for the

reasons aforesaid the MTIB report is not relevant for the purposes of ascertaining the quality and conformity of the timber with the contract at the material time.

[102] Even if I am erroneous in arriving at the aforesaid conclusion and the MTIB report ought to be taken into consideration, this does not materially affect my conclusion that the timber did not conform to specification. DW1 in his evidence confirmed that:

> After having examined all the bundles of timbers which were marked with the shipping mark Rayed/Aden, I noticed that the bundles of timber conformed to the specification of Redwood Merchantable Grade and the timbers were free from white and yellow light species.

[103] He conceded in the course of cross-examination however that in his report/letter on the results of his survey, he made no mention that the timber was 'free from white and yellow light species'. In response to a question as to why in his witness statement there was a statement to the effect that the timber was free from white and yellow light species he explained:

> ... Actually I do not know anything. The words in the affidavit are all lawyers' words. I confirmed with the lawyers that it is 100% redwood timber, as stated in the letter 8 years ago. These words in the Q&A they are the ones who wrote everything.

[104] In re-examination DW1 explained that by the use of the words 'merchantable' quality, it meant that the exporter is purchasing the lowest grade of timber. It had to be red in colour no matter how bad the grade was. His understanding was that the only type of timber that could not be utilised was decaying wood or wood with major defects. With regards to splits and wane, DW1 was guided by the Malaysia Grading Rules for Sawn Hardwood Timber, namely a small percentage of these defects was allowable for the purposes of grading.

[105] A reading of the contract stipulations in TBR-122 however shows that (as discussed above) it was a condition of the contract of sale that the timber supplied be free of splits and wane, dead knots and decay. The words 'free of mean that there must be no splits and wane, dead knots and decay. The standard 'merchantable grade' which is the basis upon which DW1 inspected the cargo does provide for some split and wane, whereas the contract does not allow for any. As such the evidence in exhs D59, D60 and that of DW1 does not establish that the timber produced for TBR-122 was in full conformity with the contract description, quality and specifications.

[106] The plaintiff further submits that DW1 in his own letter states that he found five pieces of wood out of 2,208 pieces that would not qualify as red hardwood. If this is extrapolated to the entire cargo, amounting to 1,301 tonnes or 76,552 pieces it would follow that approximately 13 tonnes or 765 pieces of timber would have been white or yellow species and contained splits and wane allowable under the 'merchantable grade'. This however is not allowed under TBR-122 which stipulates that the timber must be free from white/yellow species, splits, wane, dead knots and decaying wood.

[107] The fact that DW1 gave evidence that the timber was of merchantable grade does not mean that it conforms with the contract specifications. Given the clear description under TBR-122 neither can the defendant contend that the breach, if any, by the defendant is de minimis. In *Ronaasen & Son v Arcos Ltd* (1933) 45 Ll L Rep 33 the House of Lords stated as follows:

Lord Buckmaster said (at p 42):

> The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description, and I think the phrase 'commercially' itself shows that while the goods did not in fact answer the description, they could, as a matter of commerce, be so dealt with. But the rights of the buyers under the contract are not so limited. If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought.

Lord Warrington of Clyffe said (at p 41):

> In my opinion by acting as he did (that is the umpire) has added to the description in the contract a qualification to which the contracting parties have not agreed, and which he was not entitled to add, and that the courts below were justified in setting aside his award. It is not suggested that this is a case in which the deviations from the contractual thickness were so slight as to be negligible. In such a case a simple finding that they answered the description would be proper without the addition of such a qualification as above mentioned.

Lord Atkin said (at p 42):

> On the facts as stated by the umpire as of the time of inspection, only about 5% of the goods corresponded with the description; and the umpire finds it impossible to say what proportion conformed at the time of shipment. It was contended that in all commercial contracts the question was whether there was a 'substantial' compliance with the contract; there always must be some margin; and it is for the tribunal of fact to determine whether the margin is exceeded or not *I cannot agree. If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a*

ton, or a yard about a yard. Still less when you descend to minute measurements does 12 inch mean about 12 inch. If the seller wants a margin he must and in my experience does stipulate for it.

[108] In conclusion therefore it appears even on the evidence of DW1, that the goods supplied under TBR-122 were not free from splits and wane, and did contain what DW1 said was an acceptable level of white and yellow species. This is not in strict accordance with the contract specifications, which required the provision of 1,301.5513 metric tons of 100% red OT species of hard redwood full sawn timber merchantable grade, free from white/yellow species, decay/dead knots, splits and wane. This in turn means that the defendant breached its obligations. The breach amounted to a breach of a fundamental term of the contract for sale.

Issue (d): *Was the plaintiff entitled to reject the goods?*

[109] It is evident from above that the defendant breached the terms of TBR-122 fundamentally by not supplying timber in accordance with contract specifications. Earlier I have dealt with the evidence which shows that the defendant wrongfully refused to allow an independent examination and inspection of the goods by surveyors for the purposes of ascertaining conformity of the goods with the contract. These breaches are serious and go to the root of the contract. The failure to conform to contract specifications (as explained earlier) amounts to a breach of a condition in the contract. The unreasonable refusal to allow an independent inspection also amounted to a serious breach of the plaintiff's right of inspection and examination of the timber prior to taking delivery of the same. In these circumstances, it appears to this court that the plaintiff was entitled to treat the contract as discharged, thereby relieving it from any performance on its part.

[110] In *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 Lord Diplock stated as follows:

> The three sets of circumstances giving rise to a discharge of contract are tabulated by Anson as: (i) renunciation by a party of his liabilities under it; (ii) impossibility created by his own act; and (iii) total or partial failure of performance. In the case of the first two, the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third it can occur only at the time or during the course of performance. Moreover, if the third be partial, the failure must occur in a matter which goes to the root of the contract. All these acts may be compendiously described as repudiation ...

[111] The instant case falls within the third category entitling the plaintiff to repudiate the contract which it did. The plaintiff as explained above,

A rejected the goods vide its letter dated 17 November 2000. On a consideration of the totality of the evidence it appears to this court that the plaintiff was entitled to so reject the goods. The contract therefore stood discharged formally upon issuance of this notice of rejection.

B *Benjamin's Sale of Goods* para 12-067 (6th Ed) at p 1901 provides:

> If goods have been properly rejected and the price has already been paid in advance, the proper way of recovering the money back is by action for money paid for a consideration which has totally failed i.e. money had and received.

C

[112] The other statutory remedies available to the buyer on breach by the seller are provided under s 51 of the Act. What then would be the proper remedy to be afforded to the plaintiff?

D

[113] In the instant case the plaintiff has prayed for:

(a) loss and damages in the sum of RM1,381,686.05;

E (b) alternatively the consideration for the payment made by the plaintiff to the defendant has wholly failed and the defendant is not entitled to retain the purchase price paid in the sum of RM1,197,462.61 or any part thereof;

F (c) alternatively, the return and refund of the sum of RM1,197,462.61 as money had and received and for consequential loss and damage to be assessed by the court; and

(d) interest and costs.

G

[114] Here it is not in dispute that the defendant has received the full purchase price under TBR-122. Marwan, PW3 has given evidence of the losses suffered by it as a consequence of the defendant's breach:

H

> as a consequence to the defendant's breach of contract and refusal to allow joint inspection by independent surveyors of regulatory bodies, I verily believe that the plaintiff had suffered loss and damage in the sum of RM1,381,686.05 the particulars of which are as follows:

I

(a)	Purchase price paid	RM1,197,462.61
(b)	Loss of Profit USD36,879.12	RM140,140.66
(c)	Interest on RM359,228.16 at 9%pa bank overdraft interest from 9 May 2000 to 7 December 2000	RM18,866.86

(d)	Interest on RM838,234.00 at 9%pa bank overdraft interest with effect from 10 August 2000 until 7 December 2000	RM25,215.92
	Total	RM1,381,686.05

This sum was not challenged during the course of cross-examination and as such the defendant is deemed to have accepted the same (*Aik Ming (M) Sdn Bhd v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639). In any event evidence has been led in the course of trial in relation to the figures relating to the purchase price and loss of profit. Accordingly the plaintiff's claim is allowed with interest and costs.

Issue (e): *Is the defendant entitled to its counterclaim?*

[115] The defendant's counterclaim against the plaintiff comprises primarily storage charges for the timber which they maintain the plaintiff has wrongfully refused to take delivery of, as well as costs of insurance cover for the protection of the timber. It is evident that the success of the counterclaim hinges primarily on whether the plaintiff was justified or acted wrongfully in refusing to arrange for delivery of the timber in or around 28 August or subsequently. From the analysis above, the court had concluded that the plaintiff was justified in refusing to arrange for delivery of the subject timber because the defendant wrongfully refused the plaintiff a reasonable opportunity to re-examine the goods after receipt of complaints about a similar prior shipment. Further the plaintiff on re-inspection of the goods concluded that the timber was not in conformity with the contract, which evidence has been accepted. It is also evident that under the contract, property in the subject goods did not pass to the plaintiff, notwithstanding the delay in the nomination of a vessel and the examination of the goods by Robson. As such the plaintiff did not accept the goods. The plaintiff was entitled to and did reject the goods. It therefore follows that the defendant's contention that the plaintiff was liable for storage charges and insurance costs is untenable for these reasons. Accordingly the defendant's counterclaim is dismissed.

CONCLUSION

[116] For the reasons set out above, it appears to this court that:

(a) In this FAS contract for sale, property in the subject timber would only pass from the defendant seller to the plaintiff buyer when the timber

was brought alongside a vessel for shipment (see *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429 and *Yap Chin Hock & Anor v Cheng Wang Loong* [1964] MLJ 276).

(b) Until such time the property in the goods remained in the defendant-seller.

(c) The plaintiff buyer was entitled to exercise a right of examination/inspection after payment of purchase price and after an initial examination by its agent Robson who approved the cargo, because the property in the goods had not passed to the buyer as the timber remained on the defendant's premises.

(d) Such a right of examination or inspection is provided for statutorily in s 34 of the Act. Further by reason of the complaints in respect of a similar shipment under TBR-114, the plaintiff was entitled, as a prudent purchaser to re-examine or inspect the goods prior to shipment. In short it was not too late for the plaintiff to do so, as the goods had not been delivered nor accepted by it.

(e) The defendant's unreasonable refusal to allow the plaintiff a right to examine the goods amounts to a breach of the contract of sale.

(f) The timber under TBR-122 did not appear to conform to specifications at the material time, as borne out by the testimony of Motahar and Jamal Abdo. The testimony of Robson has to be treated with caution in view of the doubtful authenticity of the letters authored by him and his relationship with the plaintiff.

(g) The expert report by MTIB was undertaken well after the plaintiff had rejected the subject timber as a consequence of the defendant's wrongful refusal to allow an inspection, and the poor quality of the goods. As it was not undertaken at the material time but well after rejection, and without the participation of the plaintiff, and further not made available to the plaintiff at the time of the complaints about a lack of contract conformity, it cannot now comprise evidence relating to the state of the timber at the material time. For this reason, the MTIB report is not relevant and was not considered.

(h) Even if the MTIB report is taken into consideration it appears that the subject timber was not 'free from splits and wane', a condition specified in the contract of sale under TBR-122.

(i) As the goods did not conform to contract specifications, this amounted to a breach of a fundamental term of the contract of sale entitling the plaintiff to repudiate the contract, reject the goods and make demand for a return of the purchase price.

(j) In view of the foregoing conclusions, the defendant is not entitled to its counterclaim for storage charges and insurance claims. Accordingly the defendant's counterclaim is dismissed.

[117] Judgment is therefore entered for the plaintiff in the sum of RM1,197,462.61 as per prayer (b), but with no order as to damages for consequential loss. The plaintiff is also granted interest at the rate of 8%pa on the aforesaid sum from the date of judgment until the date of full and final settlement and costs.

Plaintiff's claim allowed in part with costs and defendant's counterclaim dismissed.

Reported by Kohila Nesan